



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA 38 OF 2020

JANE WAMBUI CHEGE..... APPELLANT

VS

NGANGA KIBE.....1<sup>ST</sup> RESPONDENT

JULIUS NDAMBO GITAU..... 2<sup>ND</sup> RESPONDENT

KENNETH KARAYA KAMWERE.....3<sup>RD</sup> RESPONDENT

THE LAND REGISTRAR, THIKA.....4<sup>TH</sup> RESPONDENT

(An appeal from the judgement of Hon C A Otieno Omondi SPM in MCLE NO 44OF 2019 –Thika, delivered on the 31/8/2020)

**JUDGEMENT**

1. The Appellant instituted this appeal vide a Memorandum of Appeal dated 23/9/2020 against the trial Court Judgment delivered on 31/10/2020 in **Ruiru MCL&E No. 44 of 2019**. The said Memorandum of Appeal contains fourteen (14) grounds of appeal THAT;-

- a. The Learned Magistrate erred in law and in fact in finding and holding that the Appellant had transferred L.R NO. RUIRU/MUGUTHA BLOCK 1/9650 (the suit property) to the 2<sup>nd</sup> Respondent.
- b. The Learned Magistrate erred in law and in fact in finding and holding that all documents required to legally and lawfully transfer the suit property from the Appellant to the 2<sup>nd</sup> Respondent were presented to the 4<sup>th</sup> Respondent.
- c. The Learned Magistrate erred in law and in fact in failing to find and hold that the Appellant did not have, and never possessed any and/or all the documents in respect of the alleged transfer of the suit property from the Appellant to the 2<sup>nd</sup> Respondent.
- d. The Learned Magistrate erred in law in failing to note, and to take into consideration the fact that the 2<sup>nd</sup> Respondent failed and/or refused to produce the original documents in respect of the alleged transfer of the suit property from the Appellant to the 2<sup>nd</sup> Respondent even after he was notified to produce the said documents.
- e. The Learned Magistrate erred in law and in fact in failing to find that the 4<sup>th</sup> Respondent did not produce in evidence all the requisite documents to prove that the Appellant had lawfully and legally transferred the suit property to the 2<sup>nd</sup> Respondent.
- f. The Learned Magistrate erred in fact in failing to find and hold that the List of Documents produced by the 4<sup>th</sup> Respondent as exhibits in support of the allegations that the Appellant had legally and lawfully transferred the suit property to the 2<sup>nd</sup> Respondent did not include certified copies of the Appellant's ID Card, certified copy of Appellant's PIN Certificate, a Valuation Requisition for Stamp Duty payment and/or a certified copy of stamp duty payment slip/receipt by either the Appellant or the 2<sup>nd</sup> Respondent.
- g. The Learned Magistrate erred in law and in failing to find and hold that a handwriting expert can only form an opinion and/or give evidence based on markings or writings on an original document.
- h. The Learned Magistrate erred in law and in fact in finding and holding that the Appellant did not give expert evidence on forgery o the Transfer form yet the Appellant had proved that she had neither sought the opinion of a handwriting expert in respect of the signatures appearing on the said Transfer Form.

i. The Learned Magistrate erred in law and in fact in failing to find that the evidential burden of proof in respect of the Transfer of the suit property from the Appellant to the 2<sup>nd</sup> Respondent, and also transfer from the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent had shifted from the Appellant to the 2<sup>nd</sup> Respondent.

j. The Learned Magistrate erred in law when she failed to find and hold that the 2<sup>nd</sup> Respondent did not discharge his burden of proof on the allegation that the suit property had been legally and lawfully transferred to him by the Appellant and further, that the 2<sup>nd</sup> Respondent had legally and lawfully transferred the suit property to the 3<sup>rd</sup> Respondent.

k. The Learned Magistrate erred in law in dismissing the Appellant's case only on the finding that the Appellant had not proved her allegations of fraud against all the four Respondents.

l. The Learned Magistrate erred in law and in fact in failing to find and hold that the Appellant had, on a balance of probability, proved that the transfer of the suit property from the Appellant to the 2<sup>nd</sup> Respondent was illegal, irregular, null and void.

m. The Learned Magistrate erred in law and in fact in failing to find that since the transfer of the suit property from the Appellant to the 2<sup>nd</sup> Respondent was illegal, irregular, null and void, the subsequent transfer of the said suit property was equally illegal, irregular, null and void.

n. The Learned Magistrate erred in law and in fact in dismissing the Appellant's suit in its entirety and in awarding costs of the suit to the Respondents.

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the appeal. The 4<sup>th</sup> Respondents did not participate in the appeal.

3. The suit was initially filed in Nairobi before it was transferred to the trial Court on 27/5/2019. The gist of the Appellant's case according to her plaint dated 1/8/2019 is that she purchased 100 shares in Nyakinyua Investment Ltd at Ruiru sometime in the year 2005. That upon balloting and paying the requisite fees, she was allocated plot No. 7452 (hereinafter referred to as the **suit property**). That around April 2015, she sought her cousin's (1<sup>st</sup> Respondent) help with the registration of the suit property in her name at the Lands Office. The Appellant would later in 2016 discover that the suit property was fenced off by unknown persons who carried on illegal developments thereon. That she inquired about the said developments from the 1<sup>st</sup> Respondent but he denied any knowledge of the same. That she was then forced to report the matter at Ruiru police station and registered a restriction on the said land.

4. That the Appellant then proceeded to the lands office, conducted a search which revealed that the suit property had been registered in her name as L.R Ruiru/Mugutha Block 1/9650 on the 2/7/2015. Further that on 30/9/2015, the suit property was transferred to the 2<sup>nd</sup> Respondents who in turn transferred it to the 3<sup>rd</sup> Respondent in a span of three months. She enumerated particulars of fraud against the Respondents which occasioned her loss and of the suit land. She thus prayed for orders *inter alia* that; a declaration that she is the rightful owner of the suit property, that the transfer by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent and later 3<sup>rd</sup> Respondent were fraudulent, irregular, null and void, an order for cancellation of the 3<sup>rd</sup> Respondent's title over the suit land and the Appellant's registration in his stead.

5. The Respondents denied the Appellant's claim in toto. The 1<sup>st</sup> Respondent filed his amended statement of defence on 27/3/2018 where he denied having been instructed by the Appellant to assist in the processing of the title to the suit land. He stated that he accompanied the 2<sup>nd</sup> Respondent to the law firm of **Githinji & Koki Advocates** where he witnessed the execution of the sale agreement between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the 2/11/15. It was his case that his presence in the suit is a misjoinder.

6. The 2<sup>nd</sup> Respondent denied the Appellants claim and contended that he purchased the suit land from the Appellant in 2015 and paid the consideration in the sum of Kshs 820,000/-. That thereafter he sold the said land to the 3<sup>rd</sup> Defendant. He denied the allegations of fraud, illegality and loss and averred that the acquisition was lawful and regular and devoid of any fraud.

7. The 3<sup>rd</sup> Respondent denied the Appellants claim and stated that he resides in the area and that the 2<sup>nd</sup> Respondent approached him with intention of selling him the suit land in November 2015. Upon carrying out his due diligence, he finally executed the sale agreement on 2/11/2015 and paid the consideration in full.

8. The 4<sup>th</sup> Respondent equally denied the Appellants claim in toto and maintained that the process of registration was in order and there was nothing to impugn the process and or the title in the name of the 3<sup>rd</sup> Respondent.

9. Upon hearing the suit the Learned trial Magistrate held that the Appellant failed to prove her case on a balance of probabilities and dismissed the suit with costs.

10. Aggrieved by the said decision, the Appellant filed this appeal and cited the grounds enumerated in para 1 of this judgment. The Appellant through the firm of **A.N Ndambiri & Co. Advocates** filed submissions dated 19/7/2021. She rehashed the case before the trial Court and drew three issues for determination; whether the Appellant sold the suit property to the 2<sup>nd</sup> Respondent; whether the transfers to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were lawful and lastly whether the trial Court erred in dismissing the Appellant's case for want of proof. The Appellant rightly cited **Section 107** of the Evidence Act on burden of proof. Further that the evidential burden of proof can shift to the rival party who then must discharge it.

11. On the first issue, the Appellant maintained that she discharged her evidential burden of proof that she did not sell the suit land to the 2<sup>nd</sup> Respondent. That therefore the burden of proving the 2<sup>nd</sup> Respondent's defence, that he bought the suit land from the Appellant, shifted to

him. That since the 2<sup>nd</sup> Respondent failed to testify in Court, the Appellant's case against him was undefended. Reliance was placed on the cases **Stephen Gachau Githiaga & Anor. V AG [2015] eKLR and CMC Aviation Ltd v Cruisar Ltd (No.1) [1978] KLR 103.**

12. Regarding the second issue, the Appellant reiterated that the 2<sup>nd</sup> Respondent's failure to prove his alleged purchase of the suit land, meant that the Appellant's claim that she never sold the suit land was uncontroverted. That therefore the purported transfer and subsequent transfer to the 3<sup>rd</sup> Respondent was null and void. Notably that there could not be a valid transfer from the Appellant without spousal consent as envisioned under Section 12 (1) of Matrimonial Property Act. Hence the 3<sup>rd</sup> Respondent's defence as an innocent purchaser for value cannot stand since the Respondent's alleged title was tainted with irregularities.

13. Last but not least, the Appellant impugned the trial Court's finding for ignoring the issues of legality, regularity and procedure in the transfers of the suit property. She urged the Court to allow her appeal and grant her prayers.

14. On the other hand, the 1<sup>st</sup> Respondent's submissions dated 27/9/2021 were filed by **Gicheha Kamau & Co. Advocates**. Supporting the trial Court's Judgment, the 1<sup>st</sup> Respondent invited this Court to determine three issues; whether the 1<sup>st</sup> Respondent was engaged in registration of the suit property by the Appellant; whether the 1<sup>st</sup> Respondent colluded with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to fraudulently transfer the suit land and whether the trial Court erred in dismissing the Appellant's claim.

15. The 1<sup>st</sup> Respondent submitted that the Appellant failed to proof her allegation against the 1<sup>st</sup> Respondent as required under Section 107 of the Evidence Act. That there was no evidence to demonstrate that he received instructions to effect the alleged transfer. Secondly, that allegations on fraud must be strictly pleaded and proven. That the Appellant did not proof the allegations of forgery in the impugned transfer documents. Lastly, that the Appellant's assertion that the evidential burden shifted to the Respondents, is without basis since the Appellant did not tender any evidence to rebut. He urged the Court to dismiss the appeal with costs.

16. The firm of **Wokabi Mathenge & Co. Advocates** on behalf of the 2<sup>nd</sup> Respondent's filed submissions dated 2/11/2021. He stated the role of the appellate Court and the principles to be followed as in the instant case. That the Learned Magistrate was right in dismissing the suit for want of proof as required in Section 107 Evidence Act. He defended the suit transfers as properly and procedurally done as confirmed by the 4<sup>th</sup> Respondent's testimony in the lower Court.

17. Finally, the 3<sup>rd</sup> Respondent's submissions are dated 1/9/2020 (*sic*) by **Kamuti Waweru & Co. Advocates**. The 3<sup>rd</sup> Respondent noted two issues for determinations; whether the transfer from the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent was fraudulent. He was emphatic that his title was indefeasible having legally acquired in line with the laid down procedures in the Land Registration Act, 2012. That he exercised due diligence in the transaction and was thus a bona fide purchaser for value. He also defended the trial Court's Judgement and reiterated that the Appellant did not discharge the burden and standard of proof for her claim to succeed.

### **Analysis & Determination**

18. The main issues for determination in this appeal case as adduced from the Memorandum of Appeal are; whether the Plaintiff proved her case and whether the suit land transfers were fraudulent and whether the Learned Magistrate erred in dismissing the Appellant's case.

19. The law on the duty of the first appellate Court is well settled. In the case of **Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court of Appeal stated that the primary role as a first appellate Court is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

20. Having read considered and analysed the record, the Court is of the view that this case turns on the evidence of the Appellant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are irrefutably cousins.

21. It is trite that he who alleges must prove. The record before this Court shows that the Appellant's husband, **Benard Chege Waweru** testified as PW1. It is also on record that the Appellant's counsel had indicated that the Appellant was indisposed for some time and even sought an adjournment on 18/2/2020 for her power of attorney to be registered. This was never to be according to the proceedings of 3/3/2020 when the Appellant's counsel indicated to the Court as much. Counsel opted to take a hearing date instead and filed PW1's statement. The Appellant therefore did not testify.

22. **PW1** adopted his witness statement dated 24/2/2020. He testified that he gave his wife (Jane Wambui) Kshs. 250,000/= to purchase shares from Nyakinyua Investments. That he undertook the balloting exercise and was allocated the suit property. That the 2<sup>nd</sup> Respondent who is also his cousin, approached him offering to assist with the registration of the suit land at the Lands office. This was a departure of the contents of the Appellant's plaint where it was averred that it was the Appellant who approached the 1<sup>st</sup> Respondent for help.

23. The evidence of PW1 was therefore hearsay as he stated that he was not present at home having been at work at Lari and only visited his home over the weekends. His evidence was based on his opinions of what his wife could or could not do.

24. The Plaintiffs claim rests on fraud and illegality. Allegations of fraud are serious and calls upon a deponent to not only plead but proof them to the standard required which is higher than the balance of probabilities. In this case the Appellant alleged that the signature on the documents of transfer was a forgery. There was no evidence placed before the Court to proof the forgery. This would have been by way of a hand writing expert who would have testified and disproved the signature of the documents as having been that of the Appellant. In the absence of this the Court is unable to infer fraud forgery or illegality.

25. It is the Appellant's case that since the 2<sup>nd</sup> Defendant failed to testify, her case should be taken as uncontroverted. To the contrary, the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person see Section 109 of the Evidence Act. The burden is not measured against the failure or the weakness of the opponents defence or case. The standard is he who alleges must proof. The Plaintiff failed to proof her case.

26. It is on record that the transfer was attested and witnessed by an Advocate namely **Macharia F.O.** This advocate was not called to testify to shed light on the document.

27. Having read and considered the appeal and the record of the lower Court, I find that the Appellant did not proof her case on a balance of probabilities. Consequently, I find no reason to impugn the judgement of the Hon Learned Magistrate.

28. The appeal is without merit. It is dismissed with costs payable by the Appellant.

29. Orders accordingly.

**DELIVERED, SIGNED & DATED ON THE 21<sup>ST</sup> DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Ndambiri for Appellant

Kamau for 1<sup>st</sup> Respondent

Mathenge holding brief for Waweru for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

4<sup>th</sup> Respondent - absent

Ms. Phyllis – Court Assistant